

COMMISSIONER'S DIRECTIVE #5

NOVEMBER 2011

(Replaces Directive #5 dated May 1, 1986)

DISCLAIMER: Commissioner's directives are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information that is not consistent with the law, regulations, or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUBJECT: Enforcement of Income Tax Liability Incurred by Certain Nonresident Athletes and Entertainers

REFERENCES: IC 6-3-2-2; IC 6-3-2-2.7; IC 6-3-3-3; IC 6-3-4-4.1; IC 6-3-4-9; IC 6-3-4-13; IC 6-8-8; IC 6-8.1-5-3

INTRODUCTION

Several issues are involved in enforcing the income tax liability that results from athletic and entertainment appearances in Indiana. The flow of revenue from ticket purchasers to performers varies, and different performers work under different types of contracts. In determining the Indiana tax liability that results from entertainment and certain athletic appearances in the state, three scenarios will be treated separately. These scenarios include

Section I—Employees of a Promoter or an Organizer;
Section II—Independent Contractors; and
Section III—Employees of a Production Company.

Section IV discusses the enforcement aspects of employees and independent contractors described in Sections I, II, and III.

SECTION I—EMPLOYEES OF A PROMOTOR OR AN ORGANIZER

The first scenario involves entertainers performing on a salaried basis. These entertainers are under contract as part of an employer-employee relationship and are paid a fixed amount not related to the location of a performance.

Based on this understanding, nonresident entertainers incur no tax liability on their salary. No apportionment of income is required for performances in Indiana because the entertainer's compensation is a predetermined amount unaffected by performances in Indiana. However, Indiana resident entertainers must file an Indiana income tax return and report their earnings.

Note: An Indiana resident entertainer under contract to an out-of-state employer must file an Indiana income tax return and report the entertainer's earnings. However, the resident entertainer might be eligible to receive a credit for taxes paid to another state, in accordance with IC 6-3-3-3.

SECTION II—INDEPENDENT CONTRACTORS

The second scenario involves entertainers and athletes who are not team members receiving payments for Indiana performances. (The term "team" includes a professional baseball, basketball, football, hockey, or soccer team. For more information related to the taxation of nonresident athletes who are team members, please refer to the Department's Income Tax Information Bulletin #88, available online at <http://www.in.gov/dor/3650.htm>.) This situation includes some performers in tennis and golf tournaments, nightclubs, and concerts. These "independent contractors" are paid on a per-performance basis or are parties to contracts that do not include any employer-employee relationship. Generally, ticket revenue is the property of the promoter and is used to pay expenses, including the performer's compensation for services.

Based on this understanding, an independent contractor incurs a tax liability in Indiana by performing here. Because these performers are not employees, the compensation they receive does not constitute wages or salary. Therefore, reciprocity would not apply in this situation. The independent contractor's income earned for performances in Indiana should be allocated entirely to Indiana.

Note: An Indiana resident independent contractor with similar contracts in other states must file an Indiana income tax return and report the independent contractor's income. However, income should be allocated to the state where it was earned. IC 6-3-3-3 provides a credit for taxes paid to other states, which can be claimed on the Indiana resident income tax return.

SECTION III—EMPLOYEES OF A PRODUCTION COMPANY

The third situation is the most complex. This situation involves entertainers and athletes who are not team members and who have organized an intermediate "production company" to receive payment for their performances. Typically, ticket revenue is collected by a promoter and paid to the production company. The production company then pays the performer. In this situation, the production company, its employees, or both, might incur a tax liability.

Whether an employee of a production company incurs an Indiana tax liability must be determined by examining the terms of the employment contract, as follows:

- If the employee is paid a fixed amount periodically, regardless of whether the employee performs at all of the engagements, the employee will incur a tax liability in Indiana if the employee is an Indiana resident or if the production company has a business situs here. This situation is similar to that of employees of a promoter or an organizer.
- If the employee is paid on a per-performance basis or if the employee is paid a percentage of the production company's receipts, the employee will incur a tax liability by performing in Indiana. Income should be allocated to the state where it was earned. If allocation is unattainable, income should be apportioned in the same proportion that the production company's income was apportioned.

The production company's own tax liability is distinct from that of its employees. Whenever a production company is compensated for an Indiana performance, it incurs a tax liability. The actual liability depends on whether the company is organized as a sole proprietorship, a partnership, or a corporation.

The proprietor of a sole proprietorship and the partners in a partnership will be subject to the adjusted gross income tax on their Indiana income. A corporation will be subject to the adjusted gross income tax on its Indiana income. Indiana income is determined by using the single sales factor apportionment formula found in IC 6-3-2-2.

SECTION IV—ENFORCEMENT OF TAX LIABILITIES

A. Employees of a Promoter or an Organizer

Enforcement of the tax liability incurred by employees of a promoter or an organizer is accomplished through withholding procedures. Promoters or organizers located in Indiana are required to withhold on their employees' salaries just as any other employer is required to withhold from employees' salaries.

B. Independent Contractors

Enforcement of the tax liability on independent contractors cannot be accomplished through withholding because the compensation is not salary or wages. However, these individuals are required by IC 6-3-4-4.1 to make estimated tax payments if they expect to have an Indiana tax liability of \$1,000 or more.

Any person making a payment to an independent contractor is required by IC 6-3-4-9 to report all such payments. A copy of Federal Form 1099 should be submitted to the Department. More information related to Independent Contractors' Responsibility for Income Tax Reporting and Withholding can be found in Income Tax Information Bulletin #86, available at <http://www.in.gov/dor/3650.htm>.

If the tax liability of an independent contractor is ignored, the Department can issue a jeopardy assessment against any Indiana property of the taxpayer, or the Department may require that a surety bond be posted pursuant to IC 6-8.1-5-3(c). Additionally, the Department may also sue the performer in the performer's state of residence under the Reciprocal Full Faith and Credit Taxation Act codified in IC 6-8-8.

C. Employees of a Production Company

Enforcement of the tax liability of a production company and its employees' liabilities are viewed separately:

- Payments by a production company to its employees are subject to withholding if the employees incur a tax liability in Indiana. Enforcement of this withholding requirement can be accomplished through the provision in IC 6-8.1-5-3(c) authorizing the Department to require that the company post a surety bond with the Department.
- If a production company is organized as a partnership or incorporated as an S corporation, the promoters are required to withhold adjusted gross income tax from any payments to nonresident shareholders or partners in accordance with IC 6-3-4-12 and IC 6-3-4-13. Enforcement of this withholding requirement can be accomplished through the provision in IC 6-8.1-5-3(c) authorizing the Department to require that the company post a surety bond with the Department.
- If a production company is a sole proprietorship or a partnership, the proprietor or partners are required to make estimated tax payments. Enforcement can be accomplished through a jeopardy assessment or the posting of a surety bond as provided in IC 6-8.1-5-3(c). Additionally, the Department may also sue in the proprietor's or partner's state of residence under the Reciprocal Full Faith and Credit Taxation Act codified in IC 6-8-8.

A handwritten signature in black ink that reads "John Eckart". The signature is fluid and cursive, with a large loop at the beginning of the first name.

John Eckart
Commissioner